# No. 15,720

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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THOMAS B. RUSTAD, HARVEY R. WYBORNEY, HOMER C. SKELLY, CHARLES DIVEN and JAMES JOHNSON,

*Appellants,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

**Upon Appeal from the District Court for the District of Alaska, First Division.**

## BRIEF FOR APPELLANTS.

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notice of appeal. (R. 24.) The jurisdiction of the District Court rests upon the Act of June 6, 1900, 31 Stat. 322, as amended, 48 U.S.C.A., Sec. 101; the jurisdiction of this Court, on Sec. 1291 of the new Federal Judicial Code.

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**STATEMENT.**

Appellants were fishing commercially at about 12:30 P.M. on July 12, 1956 in Alaskan waters approximately 1.4 miles northwest of Thorne Point. They were in broad daylight, in an unconcealed location. (R. 85.) While so fishing they were arrested by a Fish & Wildlife enforcement officer and were charged with the offense of fishing in a closed area, namely Zimovia Strait, in violation of 48 U.S.C., Section 222, (Alaska Commercial Fisheries Regulations 1956, Sections 121.3 and 121.4, Department of the Interior Regulatory Announcement 48, issued April, 1956).

This regulatory announcement set forth in Section 121.3 thereof authorized an open season for fishing as follows:

> "Fishing, other than trolling, in Ernest Sound, and the open waters in the vicinity of Anan Creek (excluding Zimovia Strait) is prohibited except from 6 o'clock antemeridian July 15 to 6 o'clock postmeridian August 18. . . ."

Section 121.4 provides for an open season in a larger area by specifying:

> "Open season exception. With the exception of Ernest Sound and the vicinity of Anan Creek,

fishing other than trolling is prohibited except from 6 o'clock antemeridian July 20 to 6 o'clock postmeridian August 24. During this season the weekly closed period except for trolling is extended to include the period from 6 o'clock postmeridian Friday to 6 o'clock antemeridian Monday."

On or about July 8, due to a good showing of fish, it was decided to advance the opening day of fishing in portions of the Sumner Strait district. With this in mind, telegrams were sent by the Acting Administrator of Fisheries to the principal fishing companies and to the wildlife enforcement agents on or about the night of July 8, reading as follows:

"ALASKA FISHERY REGULATION 121.3 AMENDED TO OPEN ANAN AND ERNEST SOUND SECTION AT SIX O'CLOCK ANTEMERIDIAN JULY TWELVE THIS ACTION TAKEN BECAUSE ADEQUATE EARLY ESCAPEMENT OF PINK SALMON ASSURED IN ANAN CREEK AS REVEALED BY GROUND SURVEY OF STREAM AND AERIAL SURVEY OF APPROACHES BY FWS OFFICIALS JULY SEVEN ADVISE INTERESTED PARTIES." (Exhibit A.)

"THE ERNEST SOUND AND ANAN SECTION OF THE SUMNER STRAIT DISTRICT WILL OPEN AT 6:00 AM JULY 12 INSTEAD OF JULY 15 PD PLEASE ADVISE INTERESTED PARTIES." (Exhibit B.)

These telegrams did not exclude Zimovia Strait from the Anan-Ernest Sound section open for fishing:

On July 11, a publication was made in the Federal Register amending Section 121.3 as follows:

> "121.3 Open season, Ernest Sound and Anan. Fishing other than trolling, in Ernest Sound, and the open waters in the vicinity of Anan Creek (excluding Zimovia Strait) is prohibited, except from 6 o'clock antemeridian July 12, to 6 o'clock postmeridian August 18. During this season the weekly closed period, except for trolling, is extended to include the period from 6 o'clock postmeridian Friday to 6 o'clock antemeridian Monday."

The Federal Registers are usually received in southeastern Alaska two to three weeks after publication (R. 160) and the fishermen were advised of the change of regulations by the telegrams, Exhibits A and B.

The map regularly issued by the Fish & Wildlife Service during the season of 1956 showed the Sumner Strait district divided in two sections with the lower half being shown as the Anan-Ernest Sound section. This map shows the Zimovia Strait area as a part of the Anan-Ernest Sound section. Appellants were fishing in the section designated on this map (Exhibit D) as the Anan-Ernest Sound section.

The laws and regulations for the protection of the commercial fisheries, Regulatory Announcement 48, U. S. Department of the Interior, Fish & Wildlife Service, April 1956, did not describe the boundaries of Zimovia Strait nor refer to any particular map or chart so that such boundaries could be ascertained. (R. 86.) Moreover, the boundaries were not marked on the adjoining borders of land. (R. 98.)

The appellants first received notice of the change in the regulation by means of radio telephone and rumors reported to them. (R. 224.) The appellants Rustad and Skelly also saw a copy of the telegram Exhibit B. The appellants had never seen the issue of the Federal Register of July 11, 1956. Appellants construed the telegrams (Exhibits A and B), which telegrams did not exclude Zimovia Strait from the area open to fishing on July 12, as opening the entire Anan-Ernest Sound section not closed by other fisheries regulations. (R. 190, 235.) Appellants further did not believe they were in Zimovia Strait at the time they were arrested. (R. 130-131, 232, 241.)

Appellants' fish, including fish caught previously in waters involving no conflict as to being open for fishing, were confiscated by the government, and appellants were required to go to Wrangell, Alaska, for arraignment, losing one and one-half days fishing. (R. 238.)

Thereafter, the case was tried before a jury at Juneau, Alaska, the jury returning a verdict of guilty on February 20, 1957. This appeal was taken from the judgment and sentence entered on February 27, 1957 based on the jury's verdict.

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## SPECIFICATIONS OF ERROR.

The District Court erred:

1. In denying appellants' motions for judgment of acquittal made at the conclusion of the government's

case and at the conclusion of the entire case and appellants' motion for judgment of acquittal notwithstanding the verdict and by so doing:

(a) Failing to rule that the regulation sought to be enforced was invalid due to indefiniteness.

(b) Failing to rule that the telegrams, appellants Exhibits A and B, amended the regulation sought to be enforced so as to open the Zimovia Strait area to fishing on July 12, or estopped the government from enforcing the regulation.

(c) Failing to rule that the telegrams, appellants' Exhibits A and B amended the regulation in such a manner as to make the regulation invalid for want of definiteness.

2. In failing to give appellants' Requested Instruction No. 1 as follows:

> "It appears from the evidence presented in this case that the Acting Director of the Fish and Wildlife Service at Juneau sent two telegrams shortly prior to July 12, one of which telegrams was sent to various Fish and Wildlife enforcement officers and read as follows:
>
> 'Alaska Fishery Regulation 121.3 amended to open Anan and Ernest Sound Section at six o'clock antemeridian July twelve This action taken because adequate early escapement of pink salmon assured in Anan Creek as revealed by ground survey of stream and aerial survey of approaches by FWS officials July seven Advise interested parties.'
>
> "The second telegram was sent to various fishermen and packing companies and read as follows:

'The Ernest Sound and Anan Section of the Sumner Strait District will open at 6:00 am July 12 instead of July 15 Please advise interested parties.'

"Normally a telegram does not have the force and effect of a Fisheries regulation. If, however, the defendants, in fishing in the place where they were apprehended, relied on either or both of the telegrams set forth above, the United States is estopped from denying that those telegrams are of the same effect as a regulation. Therefore, in determining whether or not defendants have been proved guilty of the offense charged beyond a reasonable doubt, the telegrams must be considered by you as a regulation amending the prior regulation 121.3—unless you find, beyond a reasonable doubt, that defendants did not rely upon such telegrams in fishing at the place where they were apprehended."

3. In giving Instruction No. 10 as follows:

"It is not necessary that the government prove that the defendants intended to fish illegally or that they knew they were fishing illegally at the time in question. It is only necessary to prove that the defendants actually fished commercially for salmon in the waters of Zimovia Strait on the 12th day of July, 1956."

over appellants' objection that said instruction failed to place the burden on the government to prove its case beyond a reasonable doubt. (R. 283.)

4. In withholding from the jury Exhibits A and B while permitting other exhibits to go to the juryroom. (R. 281-282.)

## ARGUMENT.

### I.

### FISHING REGULATION 121.3 INSOFAR AS APPLICABLE TO THE SUBJECT CASE IS UNENFORCEABLE SINCE THE BOUNDARIES OF ZIMOVIA STRAIT HAVE NOT BEEN PRESCRIBED AND THE BOUNDARIES HAVE NOT BEEN MARKED ON THE GROUND.

Appellants were fishing at a point 1.4 miles northwest of Thorne Point at the time they were apprehended. They were fishing in broad daylight on a day when it was well known that Fish and Wildlife agents were in the area.

The fishing regulations do not define the boundaries of Zimovia Strait. According to the U. S. Department of Agriculture, Forest Service official map of the Tongass National Forest, Alaska, 1951, Exhibit C, the body of water designated as Zimovia Strait is a narrow neck of water northwest of the area where defendants were fishing. The area where the defendants were fishing, according to the map, appears to be in the waters of Ernest Sound rather than Zimovia Strait. Admittedly other maps are subject of a more ambiguous construction as to the boundaries of Zimovia Strait. The official map issued by the U. S. Fish and Wildlife Service (Exhibit D) does not designate the area known as Zimovia Strait at all.

Under those circumstances in view of the location where the defendants were fishing at the time they were apprehended, it is respectfully submitted that the fisheries regulation 121.3 is unenforceable as lacking in definiteness.

The Supreme Court of the United States stated in the case of *Connolly v. General Construction Co.,* 269 U.S. 385 at 391, "that the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." See also *International Harvester Co. v. Kentucky,* 234 U.S. 216 at 221; *Collins v. Kentucky,* 234 U.S. 634 at 638.

In *Champlin Refining Co. v. Corp. Com. of Oklahoma,* 286 U.S. 210 at 243, the Court stated:

> "It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all."

See also, *United States v. Cohn Grocery,* 255 U.S. 81 at 89; *Small Co. v. American Sugar Refining Co.,* 267 U.S. 233 at 239; *Cline v. Frink Dairy Co.,* 274 U.S. 445 at 454; and *Lanzetta v. New Jersey,* 306 U.S. 451, 83 L.Ed. 888.

This same rule has been applied under similar circumstances to Alaska fishing regulations. We refer to the case of *Booth Fisheries Co. v. United States,* decided by this learned Court at 6 F. 2d 500. In that case the Booth Fisheries Company was accused of

fishing within five hundred yards of the mouth of a stream in violation of a statute making it unlawful so to fish and stating:

> "For the purposes of this section, the mouth of such creek, stream or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination."

At the trial of the case the judge instructed the jury that it was up to the jury to determine the place or location of the mouth of the creek and he instructed that the mouth of the stream emptying into tidewaters was the point or place where the waters of the stream meet tidewater at mean low tide.

This learned Court reversed the conviction stating:

> "Whether counsel is correct or not we need not inquire, but the mouth of a stream cannot be ascertained with mathematical precision, and the uncertainty of the situation demonstrates the necessity for some fixed rule on the subject. . . . But in any event the place where the mouth of the stream shall be located rests in the discretion of the Secretary of Commerce, and the location of the mouth of the stream by the Secretary is indispensable to give certainty and precision to the statute."

It is to be noted that the decision does not rest on the narrow grounds of the statutory requirement that the Secretary "determine and *mark*" the mouth of the stream, but on the basis that the "location of the mouth of the stream by the Secretary is indispensable to give certainty and precision to the statute."

Similarly in the subject case, the boundaries of Zimovia Strait without some definition being set forth in the regulation or without reference to some particular map indicating beginning and ending points, are impossible to determine and the regulation, accordingly, is fatally defective. To the same effect is the case of *United States v. Peck,* 13 Alaska 218. In that case the Secretary of Interior promulgated a regulation providing:

> "Where the closed area at the mouth of a stream has not been designated by signs erected by the Fish and Wildlife Service and where the extent of the closed area is fixed by measurement from the mouth of a stream, the mouth of such a stream shall be at a line between the extremities of its banks at mean low tide."

The late Judge Folta held that in the absence of markers being placed to designate the mouth of the stream, the regulation and statute were fatal for indefiniteness. He stated:

> "But since the line of mean low tide is itself extremely difficult, if not impossible, of determination with precision and must, therefore, remain largely a matter of guesswork, the result varying with each individual, it is obvious that the determination of the mouth of a stream will vary accordingly. Unless, therefore, the mouth as determined by the Secretary is marked, fishermen would not only not be able to determine the limits of the closed area, but the regulation itself would be lacking in that certainty which is a requisite of any penal statute and without which there can be no conviction or forfeiture."

Again it is to be noted that the decision rested on the uncertainty of the regulation rather than any statutory requirement for the Secretary to mark the stream.

It is true that in a subsequent case of *United States v. Peck,* 14 Alaska 121, a conviction was maintained for fishing within five hundred yards of the mouth of a stream where the markers had not been placed showing the mouth of the stream. The Court held:

> "It is my opinion that the presence of markers is not indispensable where those charged with the enforcement of the fisheries laws warn the violator, or he otherwise has knowledge or believes, that he is in a prohibited area. Thereafter he acts at his peril just as he does when, with markers on the shore, he underestimates the distance."

It is to be noted, however, that in that case the defendants admitted that they fished within five hundred yards of the mouth of the stream. They thus were merely attempting to rely on a technicality and it was not a situation where they were misled by the uncertainty of a regulation.

In that connection, it is to be noted that there was nothing inherently wrong with fishing at the place where appellants were apprehended. It was not at the mouth of a stream where fish congregate in schools and are thus easy victims. In fact, even under the government's interpretation of the regulations, this area would have been opened to fishing within a short time.

In the subject case, the evidence shows that the appellants thought that they were not fishing in Zimovia Strait as well as thinking that it was legal to fish in Zimovia Strait if they were fishing there. (R. 233.) Accordingly, the second *Peck* case is not applicable. Moreover, in the *Peck* case, the question was presented as to whether markers were placed to designate the five hundred yard distance from the mouth of the stream. The boat of the Fish and Wildlife Service could serve under those circumstances as a marker. In the subject case there is no starting or ending point of Zimovia Strait and the regulation falls for lack of definiteness.

The trial Court instructed the jury that,

> "It is not necessary that the government prove that the defendants intended to fish illegally or that they knew they were fishing illegally at the time in question." (R. 12.)

In an offense of this nature not dependent upon intent, it is paramount that the regulation sought to be enforced is clear so that the innocent may not be led into the commission of an offense. As indicated above, the regulation here sought to be enforced gave no definition whatsoever of "Zimovia Strait". While admittedly action of the Fish and Wildlife Service since the trial of this case should not affect this appeal, Department of the Interior Regulatory Announcement 51, Laws and Regulations for Protection of the Commercial Fisheries of Alaska, 1957, has added a section containing the very information that appellants contended should have been included in the prior regula-

tion to make it enforceable. The 1957 regulations have added a new Section 121.2a specifying:

> "(a) Anan section: Ernest Sound, Bradfield Canal, and contiguous waters excluding Zimovia Strait, northwest of a line from Thorne Point to an unnamed islet at approximately 56 degrees 06 minutes 10 seconds north latitude, 132 degrees 06 minutes west longitude."

Such a definition makes it possible for the fishermen to know what is meant by the area of Zimovia Strait excluded from the remainder of the Anan section. Merely "excluding Zimovia Strait" as specified in the 1956 regulations under which this charge was brought is so indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application".

It is further significant that generally even the regulations of 1956 gave specific reference to locations of closed waters in contrast to the regulation here sought to be enforced. See Sections: 103.12, 103.13, 104.2, 104.20, 105.2, 105.18, 107.15a, 108.23, 108.24, 109.1, 109.10, 109.15a,b,c,d,e,f,g, 109.16, 110.1, 110.12, 111.1, 111.11, 111.12, etc. Usually the clarification is by means of reference to the abutting landmarks; sometimes reference is made to longitude and latitude; and in some of the regulations the areas are specified by reference to a distance from the mouth of a stream. The mouths of streams are required to be marked and thus give a fixed reference point. In some cases, the bays themselves are marked at their entrances. It would have been a simple matter to have given bear-

ings with reference to Zimovia Strait so that the meaning of the term would be clear to the fishermen sought to be regulated. It is respectfully submitted that the failure so to do renders this regulation unenforceable.

Attempting to give definiteness to the regulation, the government, in presenting its case, referred to statements in the United States Coast Pilot, a publication of the United States Coast and Geodetic Survey, and to a chart of Ernest Sound—Eastern Passage and Zimovia Strait (Government's Exhibit 1) issued by the same survey. The regulation, however, makes no reference to any particular chart or to the Coast Pilot. Testimony indicated that fishermen and boatmen rarely used the Coast Pilot other than for purposes of ascertaining a safe anchorage. (R. 205, 213.) Moreover, the Coast Pilot is ambiguous at best in defining the area known as Zimovia Strait. This publication indicated that Zimovia Strait was "about twenty-five miles long". (R. 206, 239.) Measuring from the northern end of the strait twenty-five miles comes to a point about opposite a bay known as "Thoms Place" almost two miles to the north of the place where appellants were fishing. (R. 240-241.) The location of Thoms Place also coincides with the area proceeding from the north to the south where the body of water widens thus constituting a logical basis for concluding that it is the southerly terminus of Zimovia Strait.

In an effort to refute this point the District Attorney measured the twenty-five miles on the chart from

the point he considered to be the southern extremity of the Strait and initialed the chart. (R. 244.) The point so initialed was well below the accepted northerly end of the Strait and if the twenty-five mile area were raised so that the northern end coincided with the most southerly area that could be conceived to be the northerly boundary of the Strait, it is readily apparent that the southerly boundary of the Strait would be well north of the place where appellants were fishing. (See Government's Exhibit 1.)

It is also respectfully submitted that the evidence does not show that the appellants were fishing in Zimovia Strait. According to the official map of this area issued by the United States Forest Service, Exhibit C, Zimovia Strait does not commence until the narrowing of the waters, a considerable distance to the northwest of where appellants were apprehended. The area where appellants were apprehended appears to be a part of Ernest Sound about which there was no question as to the legality of fishing at the time of the arrest. Actually the attempt to limit the fishing could well have been intended to apply to the narrow body of water shown on the Forest Service map as Zimovia Strait, since obviously that area could be fairly well covered by a net. The area where appellants fished had the same characteristics as the broader waters of Ernest Sound. Accordingly, it is respectfully submitted that the evidence shows that the appellants were not fishing in Zimovia Strait at the time of their arrest and further that the regulation itself is fatally defective for lack of definiteness.

These objections to the validity of the regulation were timely raised by the appellants in their Motion for Judgment of Acquittal made at the conclusion of the government's case (R. 132); renewed at the conclusion of the entire case (R. 260); and by appellants' motion for Judgment of Acquittal notwithstanding the verdict. (R. 284-285.)

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## II.

### THE TELEGRAMS SENT BY THE ACTING ADMINISTRATOR OF FISHERIES AMENDED SECTION 121.3 SO AS TO LEGALIZE FISHING IN ALL OF THE ANAN-ERNEST SOUND SECTION OF THE SUMNER STRAIT DISTRICT, INCLUDING ZIMOVIA STRAIT.

The learned trial judge refused to permit the telegrams, Appellants' Exhibits A and B, to go to the jury and instructed the jury that the only effect of the telegrams was to change the date of the opening of the season. Two telegrams were sent by the Acting Administrator of Fisheries. Exhibit A addressed to various enforcement officers stated:

> "Alaska Fishery Regulation 121.3 amended to open Anan and Ernest Sound Section at six o'clock antemeridian July twelve This action taken because adequate early escapement of pink salmon assured in Anan Creek as revealed by ground survey of stream and aerial survey of approaches by FWS officials July seven Advise interested parties."

The other telegram, Exhibit B, was addressed to various canneries and fishermen and stated:

> "The Ernest Sound and Anan Section of the Sumner Strait District will open at 6:00 am July 12 instead of July 15 Please advise interested parties."

Appellants first heard of the change in the fishing regulations by reports over their radio telephone. They later saw the telegram, Exhibit B. From what they heard as to the opening of the area involved and from the telegram they read, they believed that the Anan and Ernest Sound section including Zimovia Strait was opened on July 12. (R. 190, 235.)

Certainly the government is estopped from denying that the telegrams sent by the Acting Administrator had the effect of amending regulation 121.3 in the manner set forth in those telegrams.

That the government may be estopped in a criminal case has been well established. Thus in the case of *United States v. Lemons,* 200 F. 2d 396, the Court stated:

> "We also pointed out when the criminal design originates, not with the accused, but in the mind of government officers, and the accused is lured by persuasion, deceitful representation or inducement into the commission of a criminal act, then the government is estopped by sound public policy from prosecuting the one who commits it."

Similarly in the case of *United States v. Lynch,* 256 F. 983, the Court stated:

> "Under such circumstances the government is estopped from prosecuting on the ground that it caused and created that of which complaint is made."

While no case has been found exactly in point with reference to an administrator giving out an amendment to a regulation, it is submitted that the same principle as referred to in the above cases applies in the subject case so that the government in all good conscience was estopped from denying that the telegrams amended regulation 121.3 in the manner set forth in those telegrams.

It is true that the wording in the Federal Register had a different effect from the telegrams which were sent to the law enforcement officers and to the fishermen. The Federal Register was published on July 11, 1956. It was shown that the appellants had no knowledge of the contents of the Federal Register and that the normal means of mailing a Federal Register to Juneau, Alaska, or particularly to fishermen at Petersburg, and the smaller ports in Alaska, would take several weeks. Even by air mail the register could not have arrived by the date that the appellants were apprehended. The evidence is undisputed that the appellants relied on verbal notice and the telegrams and that they had not seen the Federal Register.

It is true that in establishing fisheries regulations the administrator of fisheries must follow the procedure set forth in the Administrative Procedure Act. It is further true that in order for a regulation to be effective when shortening the opening period, the regulation must first be published as required by 5 U.S. Code Annotated, Sections 101c, 1003. See *Hotch v. United States,* 208 F. 2d 244. This, however, does

not alter the fact that where telegrams are sent out by the Acting Administrator of Fisheries, the government is estopped from denying that those telegrams have the force and effect of an amendment to the regulation. This situation actually was particularly noted by this honorable Court when it stated in the opinion on the rehearing of the *Hotch* case at 212 F. 2d 280 at p. 284, note 15:

> "As the United States in its brief points out, there are times when the commercial fishing regulations are changed while commercial fishermen are at sea and when it would be unjust to bind them with regulations published in Washington, D. C."

Similarly, in the present case, it would certainly be unjust to bind the appellants with a regulation published in Washington, D. C.

The absurdity of the consequences of attempting to disavow the contents of the telegrams sent in the subject case may readily be appreciated. For example, a telegram could well be sent to the fishing companies and to the law enforcement agencies stating that fishing is open in the Anan and Ernest Sound Section at 6:00 a.m., July 12, when actually the regulation which would be published in the Federal Register would state that the fishing was not to open until July 13. Could the telegram be held to have no effect at all so that all fishermen who relied on it and fished on July 12 could be apprehended in the same manner that appellants were apprehended in this case?

The mere suggestion that the government should not be bound by its own actions is repulsive to a sense of decency and fair play and certainly the government is estopped from taking that position.

Section 121.3 specified that fishing in Ernest Sound and the open waters in the vicinity of Anan Creek, excluding Zimovia Strait, is prohibited except during a certain period of time commencing July 15. The exclusion of Zimovia Strait was expressly set forth in that Section. A map, being the only map of the fishing districts, regularly issued by the Fish and Wildlife Service designated the Sumner Strait district as being divided in two, the southerly part being shown as the Ernest Sound and Anan section. This portion being the Ernest Sound-Anan section includes the waters of Zimovia Strait.

The Fish and Wildlife Service sent out wires, one to the enforcement agents specifying "Alaska Fishery Regulation 121.3, amended to open Anan and Ernest Sound section at 6:00 antemeridian, July 12 . . .". It is noted that this wire did not exclude the Zimovia Strait portion of the Anan and Ernest Sound section. Accordingly, it is submitted that any reasonable person would interpret that the entire Ernest Sound and Anan section was to be opened on July 12, and such evidently was the report received by appellants.

A second wire was sent to various packing companies and fishermen. This wire stated "The Ernest Sound and Anan section of the Sumner Strait District will open at 6:00 A.M., July 12, instead of July 15." Again the wording does not exclude Zimovia

Strait and the reasonable interpretation to be placed upon the wire was that the entire Ernest Sound and Anan section was open on July 12.

It would appear that the literal interpretation of the wires leads to the inescapable conclusion that the entire Ernest Sound—Anan section without exclusion of the Zimovia Strait area was open to fishing on July 12 except as restricted by other regulations. If it could be said that there is any doubt on that question, at best the wires would present an ambiguous situation such as that specified by the Supreme Court in the case of *Connolly v. General Construction Co.,* cited supra, whereby it was stated that "a statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." The Supreme Court has often reiterated this basic assumption of American criminal law. Without a doubt, the amendment to Section 121.3 as transmitted to the fishermen either indicated that the entire Anan-Ernest Sound section was open for fishing or, when looked at in the most favorable light to the government (and a criminal statute is not so construed), it presents an ambiguous situation so vague that men of common intelligence must necessarily guess at its meaning and thus it is unenforceable insofar as the Zimovia Strait area attempted exclusion is involved.

Although this matter was brought before the learned trial judge by appellants' Motions for Judgment of Acquittal, the Court ruled that the telegrams did not

alter the regulation other than to open the area exclusive of Zimovia on July 12. While appellants took the position that as a matter of law the telegrams should be regarded as having amended the regulation so as to open all of the Anan-Ernest Sound section including Zimovia Strait to fishing on July 12, after the Court's denial of appellants' motion, a requested instruction was submitted leaving to the jury the question of whether or not appellants relied on the telegrams in fishing at the place where they were apprehended. (R. 4-5.) Certainly if appellants relied on those telegrams in fishing at the place where they were apprehended, the government should be estopped from enforcing the regulation other than amended by the telegrams. It is respectfully submitted that the trial Court erred in denying the requested instruction, as well as in failing to grant appellants' motions for judgment of acquittal.

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## III.

**THE TRIAL COURT ERRED IN GIVING ITS INSTRUCTION NO. 10 FOR THE REASON THAT SAID INSTRUCTION FAILED TO PLACE THE BURDEN ON THE GOVERNMENT TO PROVE ITS CASE BEYOND A REASONABLE DOUBT.**

The Court gave Instruction No. 10 as follows:

> "It is not necessary that the government prove that the defendants intended to fish illegally or that they knew they were fishing illegally at the time in question. It is only necessary to prove that the defendants actually fished commercially for salmon in the waters of Zimovia Strait on the 12th day of July, 1956."

Timely exception was taken to this instruction as follows:

> "I also except to Instruction No. 10 wherein the Court states 'It is only necessary to prove that the defendants (280) actually fished commercially for salmon in the waters of Zimovia Strait on the 12th day of July, 1956' for the reason that I do not believe it is a correct statement of law, even on the theory of law on which the case is presented, and that it should state 'It is necessary to prove beyond a reasonable doubt that the defendants actually fished commercially for salmon in the waters of Zimovia Strait on the 12th day of July, 1956, to find the defendants guilty'."
>
> "The Court. You may have your exceptions." (R. 283.)

Although it would have been a simple matter for the Court to correct the instruction to make clear to the jury the necessity of the government to prove its case beyond a reasonable doubt, the learned trial judge refused so to do. It is well established that in a criminal prosecution, the government must prove its case beyond a reasonable doubt. It is true that the trial judge, in his Instruction No. 4, set forth the requirement that the burden of proving the offense charged beyond a reasonable doubt is on the prosecution. It is recognized that instructions must be regarded in their entirety. Nevertheless,

> "an incomplete or incorrect instruction is not cured where, when construed together with the other instructions, it is still calculated to prejudice the substantial rights of accused, and, where

> an erroneous instruction consists of a palpable misstatement of law, it is not cured by a conflicting or contradictory one which correctly states the law on the point involved, . . . Likewise, an instruction which attempts to cover the whole case, but which omits an essential element, is not cured by another covering the omitted point; . . ." (23 C.J.S. 940-941.)

These principles were recently enunciated by this honorable Court in the case of *Reynolds v. United States of America,* 238 F. 2d 460, wherein a correct statement as to the presumption of innocence of the defendant was followed by an additional statement holding in part,

> "but it is not intended to prevent the conviction of any person who is in fact guilty or to aid the guilty to escape punishment."

This Court held,

> "When this qualification is added to an instruction on the presumption of innocence, the result is to leave matters about where they would have been had no instruction on the presumption been given."

To the same effect in the subject case by stating that it was "*only* necessary to prove that the defendants actually fished commercially for salmon in the waters of Zimovia Strait on the 12th day of July, 1956", the trial Court left matters about where they would have been had no instruction on the burden of proof been given.

This matter is discussed in the case of *State v. Brady,* decided by the Supreme Court of North Carolina, October 14, 1953, 238 N.C. 404, 78 S.E. 2d 126, wherein the Court stated,

> "III. The third question challenges portions of the charge particularly the concluding instruction in respect to the possession of whiskey at the time here charged, that 'if the State has satisfied you upon all the evidence in this case that he had it there for the purpose of sale, then, gentlemen, you should return a verdict of guilty.'
>
> "The vice pointed out in the instruction is the degree of proof, that the jury be 'satisfied', instead of the correct degree 'satisfied beyond a reasonable doubt'.
>
> "In this connection it is true that in some other portions of the charge the correct rule is given. Nevertheless, where the court charges correctly in one part of the charge, and incorrectly in another, it will be held for error, since the jury may have acted upon that which is incorrect."

See also *State v. Brady,* 238 N.C. 407, 78 S.E. 2d 129; *Drossos v. United States* (8 Cir.), 2 Fed. 2d 538; *McRae v. People,* 71 P. 2d 1042, 101 Cal. 155; *State v. DiAngelo,* 13 N.E. 2d 909, 133 Ohio State 362; *State v. Vliet,* 197 Atl. 894, 120 N.J. Law 23; *Sullivan v. State,* 171 S.W. 2d 353, 146 Tex. C.R. 79.

In another case originating in the District Court for the District of Alaska this learned Court has ruled on the almost identical issue presented in the subject case. The decision in the case of *De Groot v. United States,* 78 F. 2d 244 at 253, holds

"The burden of proof with regard to self-defense was far from being made clear to the jury in the instructions given by the court in the instant case, and appellant's assignment of error as to the second instruction is well taken. In his first instruction the judge charged the jury that they must find the existence of malice and intent to kill beyond a reasonable doubt. In the fifth instruction the jury were told that the government must prove every material averment of the indictment to their satisfaction beyond a reasonable doubt. Nowhere is reasonable doubt mentioned in connection with self-defense. On the contrary, in the second instruction concerning self-defense the Court stated: 'The question is not whether the jury believes that the defendant had no safe or apparently safe means of protecting himself from death or great bodily harm, but whether the jury believes that the accused believed, and had reasonable grounds to believe, that he had no safe or apparently safe means of escape', etc.

"From the words, 'whether the jury believes', it could infer that its belief must be upon a preponderance of the evidence, whereas it was required to believe beyond a reasonable doubt that De Groot had a safe or apparently safe means of protecting himself, etc."

It is respectfully submitted the learned trial judge in the subject case erred in instructing the jury that it was *"only"* necessary to prove the fishing in Zimovia Strait since this specific instruction could well have been construed by the jury as authorizing a verdict of guilty even though government had not

proved "beyond a reasonable doubt" that the defendants had fished in Zimovia Strait.

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## IV.

**THE TRIAL COURT ERRED IN REFUSING TO PERMIT THE EXHIBITS A AND B TO BE TAKEN TO THE JURY ROOM WITH OTHER EXHIBITS IN THE CASE.**

At the request of the government, the trial Court refused to permit Exhibits A and B, the telegrams, referred to above, to be taken to the jury room with the other exhibits in the case. Appellants duly objected to this exclusion. (R. 281-282.) While it is admitted that generally a trial judge has discretion as to whether the jury upon retiring should take with it the exhibits in the case, the general rule appears to be that all of the exhibits should be taken or all should be withheld. Otherwise, the jury might well conjecture as to the reason for the withholding of certain of the exhibits with possible unfavorable results to the party submitting the exhibits withheld.

Thus in the case of *Chetwood v. Philadelphia and R. Ry. Co.,* 109 Atl. 645, 266 Pa. 435, it was held error for the trial Court to withhold from the jury a photograph and plan of the place of an accident which had been admitted in evidence. The Court stated:

> "When such exhibits are put into evidence they become a part of the case, and it is the uniform practice to give them to the jury during their deliberations."

See also: *Norecka, to use of Petranskas v. Pa. Indemnity Corp.,* 5 Atl. 2d 619, 135 Pa. Super. 474; *Foster v. Smith,* 16 So. 61, 104 Ala. 248.

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**CONCLUSION.**

The regulation excluding Zimovia Strait from the area opened to fishing was too indefinite to be enforceable since no boundaries or references as to the location of Zimovia Strait were set forth. This is particularly true in an offense such as the one charged which does not involve any criminal intent.

The telegrams, Exhibits A and B, which constituted the only notice to fishermen, opened the entire Anan-Ernest Sound section which included the area where appellants were fishing, or, in the alternative, were so ambiguous as to make the attempted exclusion of Zimovia Strait unenforceable.

The trial Court by its Instruction No. 10 erroneously set forth the requirements as to burden of proof so as to deprive the appellants of their right to have the government prove its case beyond a reasonable doubt, and the learned trial judge also erred in refusing to permit the telegrams, Exhibits A and B, to go to the jury with other exhibits introduced in the case.

The trial Court instructed the jury that it was unnecessary for the government to prove that the appellants intended to fish illegally. Before one who has no criminal intent is to be convicted of a crime,

the offense should be spelled out more clearly than in the subject regulation and telegrams, and the rights of the appellants as to burden of proof beyond a reasonable doubt should be jealously safeguarded. It is, accordingly, respectfully submitted that the judgment and sentence rendered below should be reversed.

Dated, Juneau, Alaska,
November 8, 1957.

FAULKNER, BANFIELD & BOOCHEVER,
By R. BOOCHEVER,
*Attorneys for Appellants.*

**(Appendix Follows.)**

## Appendix

| Exhibits | Identified | Offered | Received in Evidence |
|---|---|---|---|
| Government 1 | R. 44, R. 76 | R. 76 | R. 76 |
| Defendants' A and B | R. 62 | R. 48 to R. 60<br>R. 62-63 | R. 63 |
| Defendants' C | R. 112 | R. 116 | R. 116 |
| Defendants' D | R. 147 | R. 147 | R. 147 |